Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROLLAND P. WEDDELL,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Petition For *Writ Of Certiorari*
To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, COUPLED WITH THE RULE OF LENITY, PROHIBIT RETROACTIVE APPLICATION OF A NEW RULE OF LAW IN A CRIMINAL MATTER?

PARTIES TO THE PROCEEDING

The parties are the Petitioner Rolland P. Weddell and the State of Nevada.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rolland P. Weddell respectfully requests that a writ of certiorari be issued to review the judgment of the Nevada Supreme Court.

OPINIONS BELOW

After a two-day hearing on a motion to dismiss, the district court dismissed the case. A three-judge panel of the Nevada Supreme Court reversed. The three-judge panel denied a Petition for Rehearing. The en banc Nevada Supreme Court, in a 4-3 opinion, upheld the decision of the three-judge panel and reversed the decision of the district court.

STATEMENT OF JURISDICTION

The Order of the en banc panel of the Nevada Supreme Court was entered on April 10, 2002. The jurisdiction of this Court is invoked under Supreme Court Rule 10(c), i.e., "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

NRS 1.030 provides: "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state."

Weddell was charged by Information under NRS 200.471, "Assault," and NRS 202.290, "Aiming a firearm at a human being."

NRS 200.471(1) then provided as follows: "As used in this section:

(a) "Assault" means an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

NRS 202.290 provides as follows:

Unless a greater penalty is provided in NRS 202.287, a person who willfully:

> 1. Aims any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being; or
>
> 2. Discharges any firearm, air gun or other weapon, or throws any deadly missile in a public place or in any place where any person might

be endangered thereby, although an injury does not result, is guilty of a gross misdemeanor.

STATEMENT OF THE CASE

After a two-day hearing on Defendant's Motion to Dismiss, the district court dismissed this criminal matter. The State appealed, and a three-judge panel of the Nevada Supreme Court reversed the district court. The three-judge panel denied a petition for rehearing. Defendant/Respondent Weddell petitioned to an en banc panel of the Nevada Supreme Court. The en banc Nevada Supreme Court concocted a new rule of law based on statutory interpretation and applied it retroactively to a defendant in a criminal case. Review of the Nevada Supreme Court's decision is of paramount import to provide clarity on the interplay among this Court's interpretation of the Due Process Clause and the rule of lenity.[1]

The Nevada Supreme Court's majority opinion holds that the repeal of the fleeing-felon rule does not result in the rule's continued existence by virtue of NRS 1.030, the statute that mandates the application of the common law where not abrogated by an express statute. In analyzing the applicable statutes, the court announced a new rule. A new rule should not be applied to Weddell in the

[1] Cf. *Staples v. United States*, 511 U.S. 600, 619, n. 17 (1994) (rule of lenity requires that "ambiguous criminal statute[s] . . . be construed in favor of the accused"); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (similar); *United States v. Bass*, 404 U.S. 336, 347 (1971) (same).

present case.[2] That would violate the Due Process Clause of the United States Constitution.

The Nevada legislature repealed NRS 200.160(3), which contained the fleeing-felon rule, but still permitted a citizen to arrest a suspected fleeing felon pursuant to NRS 171.126. Some use of force is obviously foreseen by this statute, but exactly what force a citizen can use is not stated. Other jurisdictions with similar statutes have concluded that resort to the common law was appropriate to determine what force could be used, and that resulted in the application of the fleeing-felon rule.[3] Nevada statutes confer upon a private person and a peace officer an equal right to arrest. (NRS 171.104). The statutes make clear the broad scope of this right by allowing a private person to arrest another for a felony on information and belief (NRS 171.126); the right to pursue the arrestee anywhere in the State (NRS 171.134); the right to arrest anytime of the day (NRS 171.134); the right to break open doors and windows to effect the arrest (NRS 171.138); and the right

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[2] See *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) ("If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."

[3] Some jurisdictions allow the use of deadly force when necessary to prevent the escape of a fleeing felon. See *State v. Cooney*, 463 S.E.2d 597 (S.C. 1995) (holding that a private person may use reasonably necessary force to make an arrest and rejecting trial court's determination that using deadly force upon an unarmed fleeing felon is per se unreasonable); *People v. Hampton*, 487 N.W.2d 843 (Mich. Ct. App. 1992) (holding that, if necessary, private persons may use deadly force to prevent the escape of a fleeing felon).

to seize any weapons from the arrestee (NRS 171.146). In the majority opinion, it is determined that the repeal of the fleeing-felon rule and the simultaneous enactment of a statute permitting police to use deadly force showed a legislative intent to limit deadly force in apprehending felons to police officers.

The limitation on the use of force to arrest a felon cannot be reconciled with the statutes currently existing. This case demonstrates a willingness by the Nevada Supreme Court to adopt a new rule of law and apply this rule to conduct which occurred before the rule was crafted. The new rule is indefensible when applied to the existing law which explicitly grants to private citizens a right to arrest which is equal to the rights of police officers. Other explicit statutory rights cannot be reconciled with this new rule of law by judicial interpretation, and the practical effect is that the Nevada court has nullified a citizen's existing power of arrest. Under *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the unexpected and indefensible judicial alteration of common law now being applied to petitioner's conduct in Nevada violates the ex post facto clause of the Constitution. Unlike the scenario which confronted this court in *Rogers v. Tennessee*, 532 U.S. 451 (2001),[4] the Nevada Supreme Court failed to apply the laws which were on the books and created a wholly different interpretation which limits the right to arrest by private citizens which has been, and is presently, the law created by the Legislature. The Nevada

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[4] Another recent ex post facto and due process case, *Seling v. Young*, 531 U.S. 250 (2001), concerned a civil statute.

statutes not only provide broad latitude for the employment of force by private citizens, but also specifically provide for application of common law in the absence of more specific statutory authority. See NRS 1.030. In *Rogers,* the petitioner attempted to invoke a common law principle regarding an element of murder in that death must result within a year and one day from the act of causation. The court noted that the rule had not been adopted in the Tennessee code. The decision also reflects that Tennessee did not adopt the common law upon adoption of their statutory code. The petitioner's case is very different because the rules under which he was taking action were and are current law in Nevada. As in *Bouie, supra,* the Nevada court abrogated existing rules of law in a manner which cannot be reconciled with existing statutes and is indefensible. The new rule of law is also logically indefensible in that the Nevada court now holds a private citizen to the use of a "modicum" of force to arrest while the applicable statutes allow a citizen to search and seize for weapons and break down doors and windows to effect an arrest of a felon. The abrogation of the existing statutory scheme could not have been anticipated by Petitioner. He could not have had notice that his right to arrest was to be curtailed by the new rule. Not a single arrest provision was changed by the Legislature. The Nevada court fashioned a new rule solely out of a modification of the justifiable homicide statute – a statute which is not fairly within the scope of the conduct engaged in by petitioner in that there was no injury during the attempt to arrest and no homicide to be justified. This was an unforeseen and indefensible interpretation. In arriving at this conclusion, the Nevada Supreme

Court announced a new rule based on the Nevada Supreme Court's interpretation of legislative intent, not what the statutes expressly stated.

REASONS FOR GRANTING THE WRIT

A criminal statute should clearly state what conduct is prohibited and the penalty for its violation.[5] In this case, we have a statute that did not specify the force a citizen can use in apprehending a fleeing felon. We have the repeal of the fleeing-felon rule and the enactment of a statute permitting only police the use of deadly force in apprehending fleeing felons, and we also have a statute that directs the common law be applied where not specifically abrogated by statute. With all these variables in play, Nevada law was not so express that it can be said to be clear and unambiguous. The majority had to reject the applicability of NRS 1.030, then resort to legislative intent, then abrogate the force of existing law solely with an eye to reach a predetermined result. The rule adopted by the Nevada court is an unforeseeable and retroactive judicial limitation of statutory language that appears narrow and precise on its face. The action of the Nevada court was unexpected and indefensible by reference to current law and violates the principles recently expressed by this Court in *Rogers v. Tennessee, supra*. But when

[5] "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

reasonable ambiguity exists in a statute or series of statutes, the benefit of interpretation should favor the accused.[6]

CONCLUSION

The majority of the Nevada Supreme Court's en banc panel has announced a new rule that should not be applied in the present case. Weddell respectfully submits that, under long-standing principles elucidated in *Bouie*, the en banc panel's order should be reversed because the new rule should not apply to Weddell.

Respectfully submitted this 22nd day of May, 2002.

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Attorney at Law

[6] See *Sheriff v. Lang*, 104 Nev. 539, 542, 763 P.2d 56, 58 (1988) (noting Nevada's long-held policy that "ambiguous penal statutes must be construed liberally in favor of an accused").

EN BANC OPINION
BY NEVADA SUPREME
COURT ISSUED APRIL 10, 2002

118 Nev. Adv. Op. No. 23

April 10, 2002

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 34832

THE STATE OF NEVADA,

Appellant,

vs.

ROLLAND P. WEDDELL,

Respondent.

En banc reconsideration of *State v. Weddell*, 117 Nev. ___, 27 P.3d 450 (2001). Appeal from a district court order granting the respondent's pre-trial motion to dismiss the criminal information. First Judicial District Court, Carson City; Michael E. Fondi, Judge.

Reversed and remanded.

ROSE, J., with whom MAUPIN, C.J., and YOUNG, J., agreed, dissented in part.

Frankie Sue Del Papa, Attorney General, Carson City; Noel S. Waters, District Attorney, and Anne M. Langer, Deputy District Attorney, Carson City, for Appellant.

Fred Hill Atcheson, Reno; Day R. Williams, Carson City, for Respondent.

BEFORE THE COURT EN BANC.

OPINION ON EN BANC RECONSIDERATION

By the Court, AGOSTI, J.:

The State appeals from an order of the district court granting a motion to dismiss a criminal information against respondent Rolland P. Weddell. In a unanimous opinion, a three-justice panel of this court reversed the district court's order and remanded this case for further proceedings.[1] Weddell petitioned for rehearing, and the panel denied the petition, with one justice dissenting from the order denying rehearing. Weddell then filed a petition for en banc reconsideration. This court determined that en banc reconsideration was warranted, and the petition was granted. Having reconsidered this appeal, a majority of the full court has now concluded that this opinion upon en banc reconsideration should issue, reaffirming the panel's initial holding.

In this case, we are asked to determine whether a private person may use deadly force in making what is commonly referred to as a citizen's arrest.[2] Weddell contends that private persons have a common law right to use whatever force is necessary, including deadly force, to accomplish the arrest of and/or prevent the escape of a fleeing felon. We reject Weddell's contention for several reasons. Primarily, we conclude that the legislature indicated its disapproval of the use of deadly force by private persons when it repealed NRS 200.160(3) in 1993 and at the same time enacted NRS 171.1455. NRS 200.160(3) had

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[1] *See State v. Weddell*, 117 Nev. ___, 27 P.3d 450 (2001).

[2] NRS 171.126 sets out the circumstances under which private persons may arrest individuals.

been a codification of the common law fleeing-felon rule.[3] NRS 171.1455 limits the use of deadly force by police officers when making or attempting a felony arrest.[4] Furthermore, in enacting NRS 171.1455, which restricts an

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[3] NRS 200.160 stated as follows:

Homicide is also justifiable when committed either:

1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished;

2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is; or

3. By any person, when committed upon the person of another who is engaged in the commission of a felony or an attempted felony, or who after the commission or attempted commission of any such felony is fleeing from the premises or resisting lawful pursuit and arrest within 20 miles of the premises where such felony was committed or attempted to be committed.

[4] NRS 171.1455 reads as follows:

If necessary to prevent escape, an officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:

1. Has committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or

2. Poses a threat of serious bodily harm to the officer or to others.

officer's use of deadly force and circumscribes the application of the common law fleeing-felon rule to law enforcement, the legislature has disavowed the unbridled use of deadly force. We also note that the policies supporting the fleeing-felon rule have been eroded as a result of modern, more arbitrary distinctions between misdemeanors and felonies.

With these considerations in mind, we hold that a private person, when arresting another person pursuant to NRS 171.126, may use no more force than is necessary and reasonable to secure the arrest. We further hold that deadly force is, as a matter of law, unreasonable, unless the deadly force is used in defense of self or others against a threat of serious bodily injury.

FACTS

Weddell operates a construction business in Carson City. On the evening of October 16, 1997, a person, whom Weddell believes was James Bustamonte, was a passenger in a late-model Chevrolet Blazer that entered his business's grounds. Not recognizing the truck, John Cole, an employee of Weddell, approached it. As he did, the truck accelerated, turned toward Cole, and struck him. The passenger threatened Cole and asked about Weddell's daughter's whereabouts. Although dazed, Cole was able to relate the incident to the police and Weddell, and was able to report a partial license plate number for the truck.

By the next day, Weddell learned that the Bustamonte brothers were looking for Weddell's daughter regarding an alleged drug transaction. Weddell learned the Bustamontes' address from his daughter and provided it to a

detective at the Carson City Sheriff's Office. Unsatisfied with the detective's response, Weddell proceeded to the address. When he noticed that there was a Blazer at the residence which matched Cole's description, Weddell called police dispatch.

After fifteen minutes had passed the police had not arrived. At that time, Bustamonte and a woman exited the house and walked toward the Blazer. Weddell then parked his car behind the Blazer to prevent its departure. While pointing his gun at Bustamonte, Weddell ordered him to place his hands on the hood. After a disputed verbal exchange, Bustamonte turned and ran and Weddell shot at him several times.[5]

Weddell was arrested and charged with assault with a deadly weapon and discharging a firearm at another. After a preliminary hearing, Weddell was bound over to the district court on both counts.

Weddell filed a motion to dismiss the charges in the district court. After a hearing, the district court granted the motion. At this hearing, the district court admitted the preliminary hearing transcript and other documents

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[5] Weddell's account of the interaction is substantially different from that of two eyewitnesses. According to Weddell, Bustamonte made threatening gestures toward him. Contending that his sole motivation was to protect the public from this dangerous man, Weddell claims that he would not have shot at Bustamonte had he not felt threatened. Wanda Gambill and her daughter, Laura Dunn, testified that although they could not hear the conversation, Bustamonte did not approach Weddell or make any threatening moves toward him.

into evidence and allowed witness testimony. In dismissing the charges against Weddell, the district court made express findings of fact and conclusions of law.

In granting Weddell's motion to dismiss, the district court first recognized that Nevada law permits private persons to arrest a felon even if the felony is committed outside his or her presence. Second, it determined that Bustamonte committed a felony by striking Cole. Third, it found that Weddell was attempting to arrest Bustamonte for the felony. Fourth, it recognized that the legislature had repealed the statute justifying a person's use of deadly force when attempting to arrest a fleeing felon and had enacted a statute limiting a police officer's use of deadly force. Finally, the court concluded that as a matter of law, Weddell was not guilty of assault or discharging a firearm in public because "an individual ha[s] the right to use whatever force [i]s necessary to effect the arrest of a fleeing felon." The State appeals from that dismissal.[6]

DISCUSSION

The State contends that the district court erroneously determined that Weddell's use of deadly force to effect a citizen's arrest was permissible under Nevada law. We agree.

Nevada, like many other states, permits a private person to arrest a person suspected of committing a felony. NRS 171.126 provides that a private person may arrest another person in three situations: (1) when an

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[6] A district court's order dismissing a criminal information is appealable to this court. NRS 177.015(1)(b).

offense was committed or attempted in the arrestor's presence, (2) when the person committed a felony offense although outside the arrestor's presence, and (3) when a felony has in fact been committed and the arrestor has reasonable cause to believe that the person to be arrested has committed it.

Nevada statutes and case law do not address the amount of force permissible to effect an arrest. Some amount of force is necessarily implied in the statute, however, since the act of arresting another would seem to require a modicum of force. This case requires us to determine, as a matter of first impression, what amount of force is allowed under NRS 171.126.

At common law, the fleeing-felon rule permitted a private person to use deadly force to apprehend a felon.[7] The use of deadly force was permitted to prevent the commission of a felony or to arrest someone who had committed one. The rule was developed at a time when felonies were only the very serious, violent or dangerous crimes and "virtually all felonies were punishable by death."[8] As the United States Supreme Court noted, " 'Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected.' "[9]

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[7] *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

[8] *Id.* at 13.

[9] *Id.* at 13-14 (quoting *Model Penal Code* § 3.07 cmt. 3 at 56 (American Law Inst., Tentative Draft No. 8, 1958)).

Today, however, many crimes which are punished as felonies do not involve dangerous conduct or violence and are not punishable by death. As the United States Supreme Court observed in *Tennessee v. Garner,* the modern distinction between felonies and misdemeanors is "minor and often arbitrary."[10] For example, a person who works at a voter registration agency and who wears a "Vote for Jane Johnson" button at work is guilty of a felony.[11] A person who steals $255 worth of bedding from a hotel is guilty of a felony.[12] A person who buys $250 worth of food stamps from someone when not authorized to do so is guilty of a felony.[13] These felons, like many others, will not receive the death penalty.[14] Society would not tolerate the use of deadly force to prevent the commission of any of these crimes or to apprehend someone suspected of any of these crimes. The modern arbitrary and expanded classification of crimes as felonies has undermined the rationale for the old common law fleeing-felon rule, which, as mentioned, was to prevent the escape of a felon by inflicting the punishment that was inevitably to come.[15]

In 1931, Nevada codified the common law fleeing-felon rule by amending the justifiable homicide statute,

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[10] *Id.* at 14.

[11] NRS 293.5045.

[12] *See* NRS 205.220; NRS 205.222; NRS 193.130.

[13] NRS 207.340.

[14] NRS 193.130.

[15] *Garner,* 471 U.S. at 14.

which is currently codified as NRS 200.160.[16] In 1993, the legislature repealed Nevada's codification of the fleeing-felon rule when it passed A.B. 209.[17] In that same bill, the legislature enacted NRS 171.1455, which limits an officer's use of deadly force upon a fleeing suspect.[18] The minutes of the Senate and Assembly Judiciary Committees' hearings on the drafting of that bill reveal the legislative intent to adopt the United States Supreme Court's holding in *Garner.* While the committees were primarily concerned with the cost of defending a suit like the one in *Garner,* the minutes also inform us that the drafters were concerned with a private person's use of force against a fleeing felon.[19]

The State argues that when the legislature repealed NRS 200.160(3) and simultaneously enacted NRS 171.1455, it meant to eliminate the justified use of deadly force by private persons when arresting a felon.

Weddell argues that private persons have a common law right to use deadly force to arrest a fleeing felon. As such, he contends that the repeal of NRS 200.160(3) and

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[16] *Compare* 1931 Nev. Stat., ch. 96, § 1, at 160, *with* 1929 Nev. Compiled Laws § 10080, *and* Crimes and Punishments Act of 1911 § 133, *reprinted in* 1912 Nev. Rev. Laws § 6398.

[17] 1993 Nev. Stat., ch. 329, § 4, at 932.

[18] *Id.* § 1, at 931.

[19] Hearing on A.B. 209 Before the Senate Comm. on Judiciary, 67th Leg. (Nev., May 14, 1993); *see also* Hearing on A.B. 209 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., June 22, 1993); Hearing on A.B. 209 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., March 3, 1993).

enactment of NRS 171.1455 had no effect on the right to use deadly force.[20]

We resolve this dispute by addressing the effect of the legislature's repeal of its earlier codification of the fleeing-felon rule.[21] When a statute is repealed, we presume that the legislature intended a substantial change in the law.[22] Thus, in repealing NRS 200.160(3), the legislature indicated its disapproval of private persons using deadly force when arresting or attempting the arrest of a person suspected of a felony. In addition, by simultaneously enacting NRS 171.1455 the legislature obviously meant to limit the use of deadly force to police officers and to limit the circumstances under which police officers could employ such force. To conclude otherwise would be unreasonable. The legislature could not have meant to repose what might easily amount to vigilante

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[20] Weddell also contends that since the right to use deadly force exists at common law, the State may not prosecute him for using deadly force while attempting to arrest a fleeing felon, absent a criminal statute proscribing this conduct.

This contention is unfounded because the unlawful use (and attempted use) of force upon another is already prohibited by statute. *See, e.g.*, NRS 200.010; NRS 200.400; NRS 200.471. The former NRS 200.160(3) made these crimes justifiable, thereby providing a defense to prosecution – not an immunity from prosecution.

[21] *See Chapman Industries v. United Insurance*, 110 Nev. 454, 874 P.2d 739 (1994); *Clark Co. v. State, Equal Rights Comm'n*, 107 Nev. 489, 813 P.2d 1006 (1991); *Chapman v. City of Reno*, 85 Nev. 365, 455 P.2d 618 (1969).

[22] *Equal Rights Comm'n*, 107 Nev. at 491, 813 P.2d at 1006 (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986)).

justice in the hands of private persons while restricting the use of force in making an arrest by those who are charged by law with duties of public safety and protection.[23] By repealing the codification of the fleeing-felon rule and leaving the citizen's arrest statute and the defense of others statute intact, the legislature has abrogated the common law fleeing-felon rule while at the same time affirming that private persons may perform arrests.

Other jurisdictions similarly provide by statute that a private person may make an arrest, but do not dictate the amount of force that is allowable.[24] While we recognize that some jurisdictions allow the use of deadly force when necessary to prevent the escape of a fleeing felon,[25]

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[23] While enacting A.B. 209, the legislature left intact NRS 171.126, which authorizes private persons to arrest criminal suspects in certain situations. As noted earlier, implied in an arrest is the use of force necessary to secure it. NRS 171.138 expressly permits the breaking of a door or window in order to arrest a concealed suspected felon. We presume that the legislature was aware of these statutes when it enacted A.B. 209. *See City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985) ("It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." (citing *Ronnow v. City of Las Vegas*, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937))).

[24] *See, e.g.*, Ga. Code. Ann. § 17-4-60 (1997); Mich. Comp. Laws § 764.16 (2000).

[25] *See State v. Cooney*, 463 S.E.2d 597 (S.C. 1995) (holding that a private person may use reasonably necessary force to make an arrest and rejecting trial court's determination that using deadly force upon an unarmed fleeing felon is per se unreasonable); *People v. Hampton*, 487 N.W.2d 843 (Mich. Ct. App. 1992) (holding that, if necessary, private persons may use deadly force to prevent the escape of a fleeing felon).

we conclude that a rule authorizing arrest by any necessary means contravenes our legislature's clear intent to restrict private persons' use of deadly force as evidenced by its repeal of the former NRS 200.160(3). We also observe that some jurisdictions limit the use of deadly force despite the absence of an explicit legislative mandate to do so.

In *Prayor v. State*,[26] the Georgia Court of Appeals determined that, pursuant to a statute similar to Nevada's, private citizens may not use more force than is reasonable under the circumstances. The Georgia appellate court also determined that a private person may only use deadly force to effect an arrest when acting in self-defense or when it is necessary to prevent a forcible felony.

Similarly, in *State v. Johnson*,[27] the New Mexico Court of Appeals rejected the argument that private persons may use whatever force is necessary to prevent a fleeing felon's escape. Instead, the court held that a private citizen's use of force in apprehending a fleeing felon must be reasonable and necessary. Although New Mexico statutes provide that a homicide committed by a private person in the course of an arrest is justifiable when " 'necessarily committed . . . by lawful ways and means,' " the court held that a private person may use deadly force only "when the citizen has probable cause to believe that he or

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[26] 456 S.E.2d 664 (Ga. Ct. App. 1995).

[27] 954 P.2d 79 (N.M. Ct. App. 1997).

she is threatened with serious bodily harm or the use of deadly force."[28]

Given our legislature's evident disapproval of the fleeing-felon doctrine, and given our concern that the rationale for the rule at common law no longer exists, and given the abandonment of this common law rule in other states, we hold that, in securing or attempting an arrest under NRS 171.126, a private person may only use the amount of force that is reasonable and necessary under the circumstances. Further, we hold that the use of deadly force is, as a matter of law, unreasonable, unless the arrestee poses a threat of serious bodily injury to the private arrestor or others. Like the affirmative defense of self-defense, the State bears the burden to prove that the use of deadly force was not reasonable and necessary.[29]

CONCLUSION

The district court erred by dismissing the information filed against Weddell. Weddell has no absolute common law or statutory right to use deadly force in making an arrest. Weddell's use of deadly force to make an arrest was unreasonable, as a matter of law, unless he was threatened with serious bodily injury to himself or others. Whether Weddell was so threatened is a question of fact reserved for trial. Accordingly, we reverse the district

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[28] *Id.* at 86 (quoting NMSA 1978, § 30-2-7(C) (1963)).

[29] *See Barone v. State*, 109 Nev. 778, 858 P.2d 27 (1993).

court's order and remand this matter for reinstatement of the information and for trial upon the charges.

SHEARING, LEAVITT and BECKER, JJ. concur.

ROSE, J., with whom MAUPIN, C.J., and YOUNG, J., agree, concurring in part and dissenting in part:

The majority opinion holds that the repeal of the fleeing-felon rule does not result in the rule's continued existence by virtue of NRS 1.030, the statute that mandates the application of the common law where not abrogated by an express statute. I believe the majority reaches the correct analysis of the applicable statutes, but that the court is announcing a new rule in the process. And as Weddell argues, a new rule should not be applied to him in the present case.[1]

After the legislature repealed NRS 200.160(3), which contained the fleeing- felon rule, Nevada law still permitted a citizen to arrest a suspected fleeing felon pursuant to NRS 171.126. Some use of force is obviously foreseen by this statute, but exactly what force a citizen can use is not stated. Other jurisdictions with similar statutes have concluded that resort to the common law was appropriate to determine what force could be used, and that resulted

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[1] *See Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) ("If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." (quoting Hall, *General Principles of Criminal Law* 61 (2d ed. 1960))).

in the application of the fleeing-felon rule.[2] Unless our situation is changed by having enacted the fleeing-felon rule and then repealing it, the same reasoning should apply to this case.

In the majority opinion, it is determined that the repeal of the fleeing-felon rule and the simultaneous enactment of a statute permitting police to use deadly force showed a legislative intent to limit deadly force in apprehending felons to police officers. I concur in that analysis, but it seems to me that we have announced a new rule based on our interpretation of what the legislature intended, not what the statutes expressly stated.

A criminal statute should clearly state what conduct is prohibited and the penalty for its violation.[3] In this case, we have a statute that did not specify the force a citizen can use in apprehending a fleeing felon, we have the repeal of the fleeing-felon rule and the enactment of a statute permitting only police the use of deadly force in apprehending fleeing felons, and we also have a statute that directs the common law be applied where not specifically abrogated by statute. With all these variables in play, our law was not so express that it can be said to be clear and unambiguous. The majority had to reject the

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[2] *See, e.g., State v. Cooney*, 463 S.E.2d 597 (S.C. 1995); *People v. Hampton*, 487 N.W.2d 843 (Mich. Ct. App. 1992).

[3] *Lyons v. State*, 105 Nev. 317, 320, 775 P.2d 219, 221 (1989) (" 'The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' " (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))).

applicability of NRS 1.030, and then resort to legislative intent and the desire to reach a reasonable result to eventually decide this case. But when reasonable ambiguity exists in a statute or series of statutes, the benefit of interpretation should favor the accused.[4]

Accordingly, I think the majority correctly answers the legal question posed by this case, but in the process has announced a new rule that should not be applied in the present case. I would affirm the district court's order because the new rule should not apply to Weddell.

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[4] *Sheriff v. Lang*, 104 Nev. 539, 542, 763 P.2d 56, 58 (1988) (noting our long-held policy that "ambiguous penal statutes must be construed liberally in favor of an accused").

NEVADA SUPREME COURT ORDER ON EN BANC REHEARING

IN THE SUPREME COURT OF THE
STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. ROLLAND P. WEDDELL, Respondent.	No. 34832

Appeal from a district court order granting the respondent's pre-trial motion to dismiss the criminal information. First Judicial District Court, Carson City; Michael E. Fondi, Judge.

Reversed and remanded.

Frankie Sue Del Papa, Attorney General, Carson City; Noel S. Waters, District Attorney, and Anne M. Langer, Deputy District Attorney, Carson City, for Appellant.

Fred Hill Atcheson, Reno, for Respondent.

BEFORE SHEARING, AGOSTI and ROSE, JJ.

OPINION

(Filed Jul. 25, 2001)

By the Court, AGOSTI, J.:

In this case, we are asked to determine whether a private person may use deadly force in making what is

commonly referred to as a citizen's arrest.[1] Respondent Rolland P. Weddell contends that private persons have a common law right to use whatever force is necessary, including deadly force, to accomplish the arrest of and/or prevent the escape of a fleeing felon. We reject Weddell's contention for several reasons. Primarily, we conclude that the legislature indicated its disapproval of the use of deadly force by private persons when it repealed NRS 200.160(3) in 1993 and at the same time enacted NRS 171.1455. NRS 200.160(3) had been a codification of the common law fleeing felon rule.[2] NRS 171.1455 limits the

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[1] NRS 171.126 sets out the circumstances under which private persons may arrest individuals.

[2] NRS 200.160 stated as follows:

> Homicide is also justifiable when committed either:
>
> 1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished;
>
> 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is; or
>
> 3. By any person, when committed upon the person of another who is engaged in the commission of a felony or an attempted felony, or who after the commission or attempted commission of any such felony is fleeing from the premises or resisting lawful pursuit and arrest within 20 miles of the premises where such felony was committed or attempted to be committed.

use of deadly force by police officers when making or attempting a felony arrest.[3] Furthermore, in enacting NRS 171.1455, which restricts an officer's use of deadly force and circumscribes the application of the common law fleeing felon rule to law enforcement, the legislature has disavowed the unbridled use of deadly force. We also note that the policies supporting the fleeing felon rule have been eroded as a result of modern, more arbitrary distinctions between misdemeanors and felonies.

With these considerations in mind, we hold that a private person, when arresting another person pursuant to NRS 171.126, may use no more force than is necessary and reasonable to secure the arrest. We further hold that deadly force is, as a matter of law, unreasonable, unless the deadly force is used in defense of self or others against a threat of serious bodily injury.

FACTS

Weddell operates a construction business in Carson City. On the evening of October 16, 1997, a person, whom Weddell believes was James Bustamonte, was a passenger

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[3] NRS 171.1455 reads as follows:

> If necessary to prevent escape, an officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:
>
> 1. Has committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or
>
> 2. Poses a threat of serious bodily harm to the officer or to others.

in a late-model Chevrolet Blazer that entered his business's grounds. Not recognizing the truck, John Cole, an employee of Weddell, approached it. As he did, the truck accelerated, turned toward Cole, and struck him. The passenger threatened Cole and asked about Weddell's daughter's whereabouts. Although dazed, Cole was able to relate the incident to the police and Weddell, and was able to report a partial license plate number for the truck.

By the next day, Weddell learned that the Bustamonte brothers were looking for Weddell's daughter regarding an alleged drug transaction. Weddell learned the Bustamontes' address from his daughter and provided it to a detective at the Carson City Sheriff's Office. Unsatisfied with the detective's response, Weddell proceeded to the address. When he noticed that there was a Blazer at the residence which matched Cole's description, Weddell called police dispatch.

After fifteen minutes had passed the police had not arrived. At that time, Bustamonte and a woman exited the house and walked toward the Blazer. Weddell then parked his car behind the Blazer to prevent its departure. While pointing his gun at Bustamonte, Weddell ordered him to place his hands on the hood. After a disputed verbal exchange, Bustamonte turned and ran and Weddell shot at him several times.[4]

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[4] Weddell's account of the interaction is substantially different from that of two eyewitnesses. According to Weddell, Bustamonte made threatening gestures toward him. Contending that his sole motivation was to protect the public from this dangerous man, Weddell claims that he would not have shot at Bustamonte had he not felt threatened. Wanda

Weddell was arrested and charged with assault with a deadly weapon and discharging a firearm at another. After a preliminary hearing, Weddell was bound over to the district court on both counts.

Weddell filed a motion to dismiss the charges in the district court. After a hearing, the district court granted the motion. At this hearing, the district court admitted the preliminary hearing transcript and other documents into evidence and allowed witness testimony. In dismissing the charges against Weddell, the district court made express findings of fact and conclusions of law.

In granting Weddell's motion to dismiss, the district court first recognized that Nevada law permits private persons to arrest a felon even if the felony is committed outside his or her presence. Second, it determined that Bustamonte committed a felony by striking Cole. Third, it found that Weddell was attempting to arrest Bustamonte for the felony. Fourth, it recognized that the legislature had repealed the statute justifying a person's use of deadly force when attempting to arrest a fleeing felon and had enacted a statute limiting a police officer's use of deadly force. Finally, the court concluded that as a matter of law, Weddell was not guilty of assault or discharging a firearm in public because "an individual ha[s] the right to use whatever force [i]s necessary to effect the arrest of a fleeing felon." The State appeals from that dismissal.[5]

Gambill and her daughter, Laura Dunn, testified that although they could not hear the conversation, Bustamonte did not approach Weddell or make any threatening moves toward him.

[5] A district court's order dismissing a criminal information is appealable to this court. NRS 177.015(1)(b).

DISCUSSION

The State contends that the district court erroneously determined that Weddell's use of deadly force to effect a citizen's arrest was permissible under Nevada law. We agree.

Nevada, like many other states, permits a private person to arrest a person suspected of committing a felony. NRS 171.126 provides that a private person may arrest another person in three situations: (1) when an offense was committed or attempted in the arrestor's presence, (2) when the person committed a felony offense although outside the arrestor's presence, and (3) when a felony has in fact been committed and the arrestor has reasonable cause to believe that the person to be arrested has committed it.

Nevada statutes and case law do not address the amount of force permissible to effect an arrest. Some amount of force is necessarily implied in the statute, however, since the act of arresting another would seem to require a modicum of force. This case requires us to determine, as a matter of first impression, what amount of force is allowed under NRS 171.126.

At common law, the fleeing felon rule permitted a private person to use deadly force to apprehend a felon.[6] The use of deadly force was permitted to prevent the commission of a felony or to arrest someone who had committed one. The rule was developed at a time when felonies were only the very serious, violent or dangerous

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[6] *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

crimes and "virtually all felonies were punishable by death."[7] As the United States Supreme Court noted, " 'Though effected without the protections and formalities of an orderly trial and conviction, the killing of a resisting or fleeing felon resulted in no greater consequences than those authorized for punishment of the felony of which the individual was charged or suspected.' "[8]

Today, however, many crimes which are punished as felonies do not involve dangerous conduct or violence and are not punishable by death. As the United States Supreme Court observed in *Tennessee v. Garner,* the modern distinction between felonies and misdemeanors is "minor and often arbitrary."[9] For example, a person who works at a voter registration agency and who wears a "Vote for Jane Johnson" button at work is guilty of a felony.[10] A person who steals $255 worth of bedding from a hotel is guilty of a felony.[11] A person who buys $250 worth of food stamps from someone when not authorized to do so is guilty of a felony.[12] These felons, like many others, will not receive the death penalty.[13] Society would not tolerate the use of deadly force to prevent the commission of any of these crimes or to apprehend someone

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[7] *Id.* at 13.

[8] *Id.* at 13-14 (quoting *American Law Institute, Model Penal Code* § 3.07, cmt. 3, p. 56 (Tentative Draft No. 8, 1958)).

[9] *Id.* at 14.

[10] NRS 293.5045.

[11] *See* NRS 205.220; NRS 205.222; NRS 193.130.

[12] NRS 207.340.

[13] NRS 193.130.

suspected of any of these crimes. The modern arbitrary and expanded classification of crimes as felonies has undermined the rationale for the old common law fleeing felon rule, which, as mentioned, was to prevent the escape of a felon by inflicting the punishment that was inevitably to come.[14]

In 1931, Nevada codified the common law fleeing felon rule by amending the justifiable homicide statute, which is currently codified as NRS 200.160.[15] In 1993, the legislature repealed Nevada's codification of the fleeing felon rule when it passed A.B. 209.[16] In that same bill, the legislature enacted NRS 171.1455, which limits an officer's use of deadly force upon a fleeing suspect.[17] The minutes of the Senate and Assembly Judiciary Committees' hearings on the drafting of that bill reveal the legislative intent to adopt the United States Supreme Court's holding in *Garner*. While the committees were primarily concerned with the cost of defending a suit like the one in *Garner*, the minutes also inform us that the drafters were concerned with a private person's use of force against a fleeing felon.[18]

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[14] *Garner*, 471 U.S. at 14.

[15] *Compare* 1931 Nev. Stat., ch. 96, § 1, at 160, *with* 1929 Nev. Compiled Laws § 10080, *and* Crimes and Punishments Act of 1911 § 133, *reprinted in* 1912 Nev. Rev. Laws § 6398.

[16] 1993 Nev. Stat., ch. 329, § 4, at 932.

[17] *Id.* § 1, at 931.

[18] Hearing on A.B. 209 Before the Senate Comm. on Judiciary, 67th Leg. (Nev., May 14, 1993); *see also* Hearing on A.B 209 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., June 22, 1993); Hearing on A.B. 209 Before the Assembly Comm. on Judiciary, 67th Leg. (Nev., March 3, 1993).

The State argues that when the legislature repealed NRS 200.160(3) and simultaneously enacted NRS 171.1455, it meant to eliminate the justified use of deadly force by private persons when arresting a felon.

Weddell argues that private persons have a common law right to use deadly force to arrest a fleeing felon. As such, he contends that the repeal of NRS 200.160(3) and enactment of NRS 171.1455 had no effect on the right to use deadly force.[19]

We resolve this dispute by addressing the effect of the legislature's repeal of its earlier codification of the fleeing felon rule.[20] When a statute is repealed, we presume that the legislature intended a substantial change in the law.[21] Thus, in repealing NRS 200.160(3), the legislature indicated its disapproval of private persons using deadly force when arresting or attempting the arrest of a

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[19] Weddell also contends that since the right to use deadly force exists at common law, the State may not prosecute him for using deadly force while attempting to arrest a fleeing felon, absent a criminal statute proscribing this conduct.

This contention is unfounded because the unlawful use (and attempted use) of force upon another is already prohibited by statute. *See, e.g.*, NRS 200.010; NRS 200.400; NRS 200.471. The former NRS 200.160(3) made these crimes justifiable, thereby providing a defense to prosecution – not an immunity from prosecution.

[20] *See Chapman Industries v. United Insurance*, 110 Nev. 454, 874 P.2d 739 (1994); *Clark Co. v. State, Equal Rights Comm'n*, 107 Nev. 489, 813 P.2d 1006 (1991); *Chapman v. City of Reno*, 85 Nev. 365, 455 P.2d 618 (1969).

[21] *Equal Rights Comm'n*, 107 Nev. at 491, 813 P.2d at 1006 (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986)).

person suspected of a felony. In addition, by simultaneously enacting NRS 171.1455 the legislature obviously meant to limit the use of deadly force to police officers and to limit the circumstances under which police officers could employ such force. To conclude otherwise would be unreasonable. The legislature could not have meant to repose what might easily amount to vigilante justice in the hands of private persons while restricting the use of force in making an arrest by those who are charged by law with duties of public safety and protection.[22] By repealing the codification of the fleeing felon rule and leaving the citizen's arrest statute and the defense of others statute intact, the legislature has abrogated the common law fleeing felon rule while at the same time affirming that private persons may perform arrests.

Other jurisdictions similarly provide by statute that a private person may make an arrest, but do not dictate the amount of force that is allowable.[23] While we recognize

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[22] While enacting A.B. 209, the legislature left intact NRS 171.126, which authorizes private persons to arrest criminal suspects in certain situations. As noted earlier, implied in an arrest is the use of force necessary to secure it. NRS 171.138 expressly permits the breaking of a door or window in order to arrest a concealed suspected felon. We presume that the legislature was aware of these statutes when it enacted A.B. 209. *See City of Boulder City v. General Sales Drivers*, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985) ("It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.") (citing *Ronnow v. City of Las Vegas*, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937)).

[23] *See, e.g.*, Ga.Code. Ann. § 17-4-60 (1997); Mich. Comp. Laws § 764.16 (2000).

that some jurisdictions allow the use of deadly force when necessary to prevent the escape of a fleeing felon,[24] we conclude that a rule authorizing arrest by any necessary means contravenes our legislature's clear intent to restrict private persons' use of deadly force as evidenced by its repeal of the former NRS 200.160(3). We also observe that some jurisdictions limit the use of deadly force despite the absence of an explicit legislative mandate to do so.

In *Prayor v. State*,[25] the Georgia Court of Appeals determined that, pursuant to a statute similar to Nevada's, private citizens may not use more force than is reasonable under the circumstances. The Georgia appellate court also determined that a private person may only use deadly force to effect an arrest when acting in self-defense or when it is necessary to prevent a forcible felony.

Similarly, in *State v. Johnson*,[26] the New Mexico Court of Appeals rejected the argument that private persons may use whatever force is necessary to prevent a fleeing felon's escape. Instead, the court held that a private citizen's use of force in apprehending a fleeing felon must be

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[24] *See State v. Cooney*, 463 S.E.2d 597 (S.C. 1995) (holding that a private person may use reasonably necessary force to make an arrest and rejecting trial court's determination that using deadly force upon an unarmed fleeing felon is per se unreasonable); *People v. Hampton*, 487 N.W.2d 843 (Mich. Ct. App. 1992) (holding that, if necessary, private persons may use deadly force to prevent the escape of a fleeing felon).

[25] 456 S.E.2d 664 (Ga. Ct. 1995).

[26] 954 P.2d 79 (N.M. Ct. App. 1997).

reasonable and necessary. Although New Mexico statutes provide that a homicide committed by a private person in the course of an arrest is justifiable when " 'necessarily committed . . . by lawful ways and means,' " the court held that a private person may use deadly force only "when the citizen has probable cause to believe that he or she is threatened with serious bodily harm or the use of deadly force."[27]

Given our legislature's evident disapproval of the fleeing felon doctrine, and given our concern that the rationale for the rule at common law no longer exists, and given the abandonment of this common law rule in other states, we hold that, in securing or attempting an arrest under NRS 171.126, a private person may only use the amount of force that is reasonable and necessary under the circumstances. Further, we hold that the use of deadly force is, as a matter of law, unreasonable, unless the arrestee poses a threat of serious bodily injury to the private arrestor or others. Like the affirmative defense of self-defense, the State bears the burden to prove that the use of deadly force was not reasonable and necessary.[28]

CONCLUSION

The district court erred by dismissing the information filed against Weddell. Weddell has no absolute common law or statutory right to use deadly force in making an arrest. Weddell's use of deadly force to make an arrest was unreasonable, as a matter of law, unless he was

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[27] *Id.* at 86 (quoting NMSA 1978, § 30-2-7(C) (1963)).

[28] *See Barone v. State*, 109 Nev. 778, 858 P.2d 27 (1993).

threatened with serious bodily injury to himself or others. Whether Weddell was so threatened is a question of fact reserved for trial. Accordingly, we reverse the district court's order and remand this matter for reinstatement of the information and for trial upon the charges.

/s/ Agosti, J.
Agosti

We concur:

/s/ Shearing, J.
Shearing

/s/ Rose, J.
Rose

DISTRICT COURT ORDER BY DISTRICT JUDGE FONDI

Case No. 97-01851C
Dept. No. 2

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY

THE STATE OF NEVADA,

Plaintiff,

vs.

ROLLAND WEDDELL,

Defendant.

/

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISMISSAL

(Filed Aug. 19, 1999)

This matter came before the court upon a Motion to Dismiss filed by the Defendant. The State of Nevada was represented by Anne M. Langer, Deputy District Attorney for Carson City, and the Defendant was present and represented by Fred Hill Atcheson, Esq. The Court, after reading all the pleadings and papers on file herein, hearing the testimony of witnesses and the arguments of counsel, finds as follow:

FINDINGS OF FACT

For purposes of this decision upon the Defendant's Motion to Dismiss, this Court finds the following facts were proved:

On October 16, 1997, at approximately 6:00 p.m., James Bustamonte was a passenger in a vehicle that entered the Defendant's (hereafter "Weddell") construction equipment yard. John Cole and Dustin Rand,

employees of Weddell, were present at the yard at the time the vehicle entered. Neither Mr. Cole nor Mr. Rand recognized the vehicle so they approached it. The vehicle accelerated at a high rate of speed and Mr. Cole was struck by the vehicle. This Court finds that although Mr. Cole was not seriously injured, the acts constituted Battery with the Use of a Deadly Weapon and Assault with the Use of a Deadly Weapon, felonies. As the vehicle turned again toward Cole, the passenger stated words to the effect that they intended to injure Mr. Cole and Mr. Rand and that they were looking for "Kelly," Weddell's daughter. A partial license plate number was taken at the scene by Mr. Cole and he was able to positively identify the vehicle which was found in the possession of James Bustamonte the following day.

Parts of the Chevrolet grill, broken when Mr. Cole was hit by the Blazer, were found at the scene and were later matched to the vehicle in Bustamonte's possession. Jeff Curnutt testified at the preliminary hearing that on October 16, 1997 just before dark, John and James Bustamonte brought their Blazer over to his house, located at 3431 Debbie Way. His home is located near the Weddell construction yard; The Bustamontes asked him if they could park the vehicle behind his house. The next day, at 8:00 a.m., on October 17, 1997, the Bustamontes picked up the vehicle at Curnutt's house.

Mr. Cole testified that he had made a positive identification of James Bustamonte as the person who was the passenger in the vehicle at the time of the assault. In addition, Mr. Cole made an identification of James Bustamonte from a photo line up; however he alleged that the photo line up was not accurate because the person he

picked had a moustache at the time of the incident. Detective Sandage corroborated that James Bustamonte had a moustache at the time that the incident at the construction yard took place and that the photograph he had used was an older booking photograph of James Bustamonte clean-shaven. Mr. Cole again made an identification of James Bustamonte from a second photo array at the preliminary hearing.

On October 16, 1997, a full sheriff's report was taken by Deputy Paula Leever in relation to the events which took place at Weddell's construction yard. The occurrence was related by Mr. Cole to Weddell. During the evening of October 16, 1997, Weddell sought information about the perpetrators by questioning his daughter's friends, using his daughter's address book. He determined that the Bustamontes had been in possession of an old Blazer during the relevant period of time. On the morning of October 17, 1997, Weddell questioned his daughter about the distinctive vehicle seen in the construction yard and received corroboration that the Bustamontes had control of the vehicle. Weddell's daughter further related that these two people had involved her in drug dealing and made threats for money from her as recently as the previous afternoon. Weddell notified Detective King at the Carson City Sheriff's Office about this information. At the time of the notification, Detective King had not received the report drafted by Deputy Leever. King testified that he had an appointment out of the office and could not deal with the matter at that time. He then testified that he instructed Weddell to call CCSO dispatch so that a unit could be sent to his business to take a supplemental

report which would then be assigned to a detective for investigation.

Weddell apparently was not satisfied with that response and he requested his daughter to take him to the last address where she saw the Bustamontes and the Blazer – 2459 Scotch Pine Drive, Carson City. When Weddell arrived at the address he found the Blazer with the broken grill and description similar to that given by Rand. Weddell called police dispatch and told them to send a unit to the Scotch Pine address. Weddell continued his surveillance of the Bustamonte home and waited for the police to arrive. The dispatch tapes were admitted as evidence and corroborate Weddell's testimony. Approximately fifteen minutes later, two persons came from the house toward the Blazer, one of whom was James Bustamonte. Weddell was told by his daughter that the male exiting the house was one of the persons who had been threatening her to pay for drugs she had purchased. Weddell directed his wife and daughter to get out of the vehicle and then drove his Chevrolet Suburban to the Blazer to prevent its departure from the Scotch Pine address. Weddell confronted James Bustamonte, aimed a gun at Bustamonte, told him he was under arrest and ordered him to place his hands on the hood of the Blazer. After an unclear verbal exchange, Bustamonte turned and ran and Weddell proceeded to shoot at him several times but missed. The evidence indicated Weddell fired four shots.

CONCLUSIONS OF LAW

NRS 171.126 states:

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his [sic] presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.

The Court notes that the rights of a private citizen to arrest are codified in Nevada Revised Statutes in NRS 171.104 and 171.126. The Court finds that there is ample evidence which established that the Blazer found in the possession of James Bustamonte on October 17, 1999, was the same Blazer that was used in the commission of the crimes of Battery with a Deadly Weapon and Assault with a Deadly Weapon against John Cole and Dustin Rand on October 16, 1997. The Court further finds that James Bustamonte either committed a felony or was a principal to the commission of a felony through his action at Weddell's construction yard on October 16, 1997 and Weddell was attempting to arrest him for the commission of that felony pursuant to NRS 171.126(2). Although, this Court need not address the issue of whether Weddell had "reasonable cause" for believing the person arrested to have committed a felony as set forth in NRS 171.126(3), he clearly had reasonable cause to believe Bustamonte had done so.

It is also the law that a person making an arrest under NRS 171.104 and 171.126 does not have to state

that he is doing so in order to avail himself of the benefits of the provision. *State v. Acosta,* 49 Nev. 184 (1926).

NRS 1.030 states: "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United states, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state." *See also,* NRS 175.221(2)(C).

NRS 200.160, the "fleeing felon rule," was repealed by the Legislature in 1993. NRS 200.160(3) stated as follows:

> A. 200.160 Additional cases of justifiable homicide. Homicide is also justifiable when committed either:
>
> 1. . . .
>
> 2. . . .
>
> 3. By any person, when committed upon the person of another who is engaged in the commission of a felony or an attempted felony, or who after the commission or attempted commission of any such felony is fleeing from the premises or resisting lawful pursuit and arrest within 20 miles of the premises where such felony was committed or attempted to be committed.

NRS 171.1455 was codified at the same time NRS 200.160 was repealed. NRS 171.1455 states:

> If necessary to prevent escape, an officer may, after giving a warning, if feasible, use deadly force to effect the arrest of a person only if there is probable cause to believe that the person:

1. Has committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or

2. Poses a threat of serious bodily harm to the officer or to others.

NRS 171.1455 is limited to law enforcement and does not limit the rights of a citizen to use deadly force when making an arrest. Since there has not been a statute to replace the repealed NRS 200.160, pursuant to NRS 175.211(2)(c) the common law rules apply in the present matter. Under common law rules an individual had the right to use whatever force was necessary to effect the arrest of a fleeing felon. *Tennessee v. Garner,* 471 U.S. 1 (1985). This Court finds that since James Bustamonte was a "fleeing felon" at the time Weddell shot at him, Weddell had the right to use deadly force in effectuating the arrest of James Bustamonte.

Nevada is a vast region, and law enforcement officers cannot be in all places to protect the rights of citizens and the public peace. It requires, in many cases, the actions of private citizens to bring persons to justice and uphold our laws. Mr. Bustamonte is indeed fortunate that the shots fired by Mr. Weddell missed him. The great mystery in this case is how Weddell missed Bustamonte at the distance he testified he fired at him.

ORDER

The case above-entitled is hereby dismissed with prejudice for the reasons discussed above. Further, all restrictions previously placed upon Rolland P. Weddell,

including bail and the seizure of property, are herewith dismissed.

Dated this 19th day of August, 1999.

/s/ Michael E. Fondi
DISTRICT JUDGE

cc: Ann M. Langer, Esq.
Fred Hill Atcheson, Esq.

CRIMINAL INFORMATION

Case No. 97-01851C

Dept. No. II

IN THE FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE STATE OF NEVADA,
Plaintiff,

vs.

ROLLAND P. WEDDELL
PCN: 07844613,

Defendant.
_____/

CRIMINAL
INFORMATION

STATE OF NEVADA,)
: ss
CARSON CITY.)

ANNE M. LANGER, Deputy District Attorney in and for Carson City, State of Nevada, in the name and by the authority of the State of Nevada, informs the Court as follows, to-wit:

That ROLLAND P. WEDDELL, the Defendant above-named, on or about the 17th day of October, 1997, and before the filing of this Information, in Carson City, State of Nevada, did then and there commit a category B felony, to-wit: ASSAULT WITH A DEADLY WEAPON, as defined by NRS 200.471 (Count I) and a gross misdemeanor, to-wit: DISCHARGING A FIREARM AT

ANOTHER, as defined by NRS 202.290 (Count II), in the manner following, to-wit:

COUNT I

That the said Defendant did willfully and unlawfully attempt to commit a violent injury upon the person of JAMES BUSTAMONTE, coupled with the present ability to do so, at 2459 Scotch Pine, Carson City, Nevada, with the use of a deadly weapon, to-wit: a Glock 40SW handgun, in the manner following, to-wit: the Defendant fired shots from his handgun at the victim as the victim fled on foot down the street, all of which occurred at or near 2459 Scotch Pine, Carson City, Nevada.

COUNT II

That the said Defendant did willfully and unlawfully discharge a Glock 40SW handgun at JAMES BUSTAMONTE, at 2459 Scotch Pine, Carson City, Nevada.

All of which is contrary to the form of the Statutes in such cases made and provided and against the peace and dignity of the State of Nevada.

DATED this 26th day of November, 1997.

/s/ Anne M Langer

The following are the names of such witnesses for the State of Nevada as are known to me at the time of filing this Information:

SGT. RAY SAYLO
DETECTIVE KEN SANDAGE
DETECTIVE ROD KING
DEPUTY PETER GRIMM
DEPUTY DAVE DUNBAR
DEPUTY MIKE BETTER
DEPUTY RICHARD POPE
FORENSIC SPECIALIST DEAN HIGMAN
FORENSIC SPECIALIST BARRY CRAVEN
DISPATCHER PATTI KNIGHT
901 E. Musser Street
Carson City, Nevada

CRUZ BUSTAMONTE
RONALD BUSTAMONTE
2459 Scotch Pine
Carson City, Nevada

JORGE PEREZ
2625 Pinion Pine
Carson City, Nevada

STACY FORD
201 David St., #23
Carson City, Nevada

JAMES BUSTAMONTE
10247 Pistachio Way
Sacramento, California

JOHN COLE
2271 Arrowhead Drive
Carson City, Nevada

NEVADA SUPREME COURT ORDER ON PETITION FOR REHEARING

IN THE SUPREME COURT OF THE
STATE OF NEVADA

THE STATE OF NEVADA, Appellant, vs. ROLLAND P. WEDDELL, Respondent.	No. 34832

ORDER DENYING REHEARING

(Filed Jan. 15, 2002)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Shearing, J.
Shearing

/s/ Agosti, J.
Agosti

cc: Hon. William A. Maddox, District Judge
Attorney General/Carson City
Carson City District Attorney
Day R. Williams
Fred Hill Atcheson
Carson City Clerk

ROSE, J., dissenting:

Our opinion in this case held that the repeal of the fleeing-felon rule did not result in the rule's continued existence by virtue of NRS 1.030, the statute that mandates the application of the common law where not abrogated by an express statute. I still believe we reached the correct analysis of the applicable statutes, but that we were announcing a new rule in the process. And as Weddell argues, a new rule should not be applied to him in the present case.

After the legislature repealed NRS 200.160(3), which contained the fleeing-felon rule, Nevada law still permitted a citizen to arrest a suspected fleeing felon pursuant to NRS 171.126. Some use of force is obviously foreseen by this statute, but that is not stated in the statute. Other jurisdictions with similar statutes have concluded that resort to the common law was appropriate, and that resulted in the application of the fleeing-felon rule.[1] Unless our situation is changed by having enacted the fleeing-felon rule and then repealing it, the same reasoning would apply to this case.

In our prior analysis, we determined that the repeal of the fleeing-felon rule and the simultaneous enactment of a statute permitting police to use deadly force showed a legislative intent to limit deadly force in apprehending felons to police officers. Upon reflection, this seems to me to be a new rule based on our interpretation of what the

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[1] *See, e.g., Prayor v. State*, 456 S.E.2d 664 (Ga. Ct. App. 1995); *State v. Johnson*, 954 P.2d 79 (N.M. Ct. App. 1997).

legislature intended, not what the statutes expressly stated.

A criminal statute should clearly state what conduct is prohibited and the penalty for its violation.[2] In this case, we had a statute that did not specify the force a citizen can use in apprehending a fleeing felon, we had the repeal of the fleeing-felon rule and the enactment of a statute permitting only police the use of deadly force in apprehending fleeing felons, and we also had a statute that directs the common law be applied where not specifically abrogated by statute. With all these variables in play, our law was not so express that it can be said to be clear and unambiguous. We had to resort to legislative intent and a desire to reach a reasonable result to eventually decide the case. But when reasonable ambiguity exists in a statute or series of statutes, the benefit of interpretation should favor the accused.[3]

Accordingly, I think we correctly answered the legal question posed in our prior opinion, but did not realize that we were announcing a new rule in so doing. I would affirm the reasoning stated in our opinion, but would

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[2] *Lyons v. State*, 105 Nev. 317, 320, 775 P.2d 219, 221 (1998) ("The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))).

[3] *Sheriff v. Lang*, 104 Nev. 539, 541, 763 P.2d 56, 58 (1988) (noting our long-held policy that "an ambiguous statute must be construed liberally in favor of the accused").

grant rehearing and reverse the outcome because the new rule should not apply to the accused in this case.

/s/ Rose, J.
Rose

NEVADA STATUTES

TWO NEVADA STATUTES: NRS 200.471 AND NRS 202.290

NRS 200.471 Assault: Definitions; penalties.

NRS 200.471 Assault: Definitions; penalties.

1. As used in this section:

(a) "Assault" means intentionally placing another person in reasonable apprehension of immediate bodily harm.

(b) "Officer" means:

(1) A person who possesses some or all of the powers of a peace officer;

(2) A person employed in a full-time salaried occupation of fire fighting for the benefit or safety of the public;

(3) A member of a volunteer fire department;

(4) A jailer, guard, matron or other correctional officer of a city or county jail;

(5) A justice of the supreme court, district judge, justice of the peace, municipal judge, magistrate, court commissioner, master or referee, including a person acting pro tempore in a capacity listed in this subparagraph; or

(6) An employee of the state or a political subdivision of state whose official duties require him to make home visits.

(c) "School employee" means a licensed or unlicensed person employed by a board of trustees of a school district pursuant to NRS 391.100.

(d) "Taxicab" has the meaning ascribed to it in NRS 706.8816.

(e) "Taxicab driver" means a person who operates a taxicab.

(f) "Transit operator" means a person who operates a bus or other vehicle as part of a public mass transportation system.

2. A person convicted of an assault shall be punished:

(a) If paragraph (c) or (d) of this subsection does not apply to the circumstances of the crime and the assault is not made with the use of a deadly weapon, or the present ability to use a deadly weapon, for a misdemeanor.

(b) If the assault is made with the use of a deadly weapon, or the present ability to use a deadly weapon, for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

(c) If paragraph (d) of this subsection does not apply to the circumstances of the crime and if the assault is committed upon an officer, a school employee, a taxicab driver or a transit operator who is performing his duty and the person charged knew or should have known that the victim was an officer, school employee, taxicab driver or transit operator, for a gross misdemeanor, unless the assault is made with the use of a deadly weapon, or the present ability to use a deadly weapon, then for a category B felony by imprisonment in the state

prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

(d) If the assault is committed upon an officer, a school employee, a taxicab driver or a transit operator who is performing his duty, by a probationer, a prisoner who is in lawful custody or confinement or a parolee, and the probationer, prisoner or parolee charged knew or should have known that the victim was an officer, school employee, taxicab driver or transit operator, for a category D felony as provided in NRS 193.130, unless the assault is made with the use of a deadly weapon, or the present ability to use a deadly weapon, then for a category B felony by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, or by a fine of not more than $5,000, or by both fine and imprisonment.

(Added to NRS by 1971, 1384; A 1981, 903; 1985, 248; 1989, 1010; 1991, 124, 774; 1995, 21, 1190, 1321; 1997, 434; 1999, 140; 2001, 380, 986, 987)

NRS 202.290 Aiming firearm at human being; discharging weapon where person might be endangered. Unless a greater penalty is provided in NRS 202.287, a person who willfully:

1. Aims any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being; or

2. Discharges any firearm, air gun or other weapon, or throws any deadly missile in a public place or in any place where any person might be endangered thereby, although an injury does not result, is guilty of a gross misdemeanor.

[1911 C&P § 344; RL § 6609; NCL § 10292] – (NRS A 1989, 820, 1240, 1243)